Supreme Court, U. S.
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IN THE

Supreme Court of the United States

No. 74-1638

October Term, 1975.

HORTONVILLE JOINT SCHOOL DISTRICT NO. 1; BOARD OF EDUCATION OF HORTONVILLE JOINT SCHOOL DISTRICT NO. 1 ROGER WEIHING, ROBERT HAUK, JEAN MEADS, FLOYD MEYER, MERLIN PLAMANN, VICTOR SCHROTH and RONALD SURPRISE, individually and as officers and members of the Board of Education of Hortonville Joint School District No. 1; and MARVIN OBRY, ROBERT KOHLS and GENE RIEDL, individually and as administrators of Hortonville Joint School District No. 1,

Petitioners,

v.

HORTONVILLE EDUCATION ASSOCIATION and MICHAEL WISNOSKI, ROSE MARIE OLSON, THOMAS NADEAU, JUDY MURPHY, RUSSEL LICHTE and RONALD HAMMOND,

Respondents.

Amicus Curiae Brief on Behalf of County of Broome, State of New York.

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Hortonville Joint School District No. 1; Board of Education of Hortonville Joint School District No. 1; Roger Weihing, Robert Hauk, Jean Meads, Floyd Meyer, Merlin Plamann, Victor Schroth and Ronald Surprise, individually and as officers and members of the Board of Education of Hortonville Joint School District No. 1; and Marvin Obry, Robert Kohls and Gene Riedl, individually and as administrators of Hortonville Joint School District No. 1,

Petitioners,

v.

Hortonville Education Association and Michael Wisnoski, Rose Marie Olson, Thomas Nadeau, Judy Murphy, Russel Lichte and Ronald Hammond,

Respondents.

Amicus Curiae Brief on Behalf of County of Broome, State of New York.

Statement of Interest.

The County of Broome is a municipal corporation organized and existing under the laws of the State of New York. Pursuant to the laws of the State of New York, Broome County is the public employer of teachers at Broome Community College. These teachers are pro-

hibited from striking by state law, but this prohibition does not necessarily prevent strikes. In the event of a protracted strike, the County of Broome would be confronted with the Hortonville dilemma. Education would come to a halt at Broome Community College for as long as the whims of the teachers dictated and not only would the students be without education, but also the County would have to pay administrative costs and refund tuition. In light of the County's obligation to provide community college education, the only feasible alternative to an illegal protracted work stoppage may well be to give notice to the teachers that unless they return to their educational duties they will be replaced after a hearing before the County's Excutive Officer, subject to review by the courts of this state. The Hortonville case reaches that issue.

Summary of Argument.

The Constitution does not guarantee the right to strike and the rationale for prohibiting strikes in the public sector is based upon sound reasoning. Governments have a legitimate interest in prohibiting strikes by their employees. Anti-strike laws with respect to governmental employees are common in the United States. Both Federal and state courts have recognized this legitimate interest. Strikes in the public sector have crippled essential services and can cause substantial injury to the public health, safety and welfare. Governments cannot go out of business, and priorities of governmental services should be established by the legislature rather than by the relative brute force of respective unions. Striking is neither an asoblute nor relative right in the public sector. The Constitution does not guarantee an absolute right to strike, and, on a balancing of interests, the government has at paramount interest in prohibiting strikes by public employees.

Procedural due process is not violated when a public officer-employer acts as a hearing officer on the issue of striking employees. This is even more true when the hearing is subject to a judicial review. Procedural due process is a many faceted concept. The range of rights depends on a balancing of interest. The only rights governmental employees have to their positions were created by the same statute which delimited these rights by specific procedures. The paramount interest of the state to regulate labor relations with its own employees is fundamental and a valid exercise of its police powers. Federal regulation of state employees labor relations is conspicuously absent. Even assuming Federal due process applies to hearings on striking governmental employees, an in-house hearing officer is not inherently biased and such decisions are subject to judicial review. Furthermore, in balancing the governmental interests with the employees rights, the government's interests are paramount.

POINT I.

Neither the 14th Amendment nor the 5th Amendment to the Federal Constitution give public employees the substantive right to strike.

The constitutionality of anti-striking laws has withstood challenged in both the Federal and state courts. These laws are based upon thoroughly reasoned public policy and are common in the public sector in the United States. For example employees of the United States Government (18 U.S.C. Section 1918), governmental employees in the State of Wisconsin (1 Wisc. Stat. Section 111.70[4][1]), and governmental employees in the State of New York (9 Civil Service Law Section 210) are prohibited from engaging in a strike. Similar pro-

hibitions against strikes are found in other states (see generally, Labor Law: Right of Public Employees to Strike or Engage in Work Stoppage, James Duff, 37 ALR 3rd 1147). The constitutionality of the strike prohibitions has been uniformly upheld.

Federal courts have recognized the interests of government in regulating strikes in both the private and public sector. At the dawn of labor organizing in the United States, Justice Brandeis delimited the right to strike and the power of the courts to enjoin illegal strikes in the case of *Dorchy v. Kansas,* 272 U. S. 306 (1926):

> "Neither the common law, nor the Fourteenth Amendment, confers the absolute right to strike." 272 U. S. at 311.

Thereafter strikes in the private sector received limited protection by the National Labor Relations Act (49 Stat. 449, 452 [1937]). Yet some strikes in the private sector remain illegal; for example, the Supreme Court has held that a sit down strike in the private sector remains illegal and constitutes adequate cause for discharge. *Labor Board v. Fansteel Corp.,* 306 U. S. 240, 256 (1939). In the public sector, discharge should also be a permissible remedy of the employer for violations of specific statutory provisions against striking, and the Federal and state courts have so held.

Federal courts have considered the prohibition against striking in the public sector. The Supreme Court has cited Federal anti-striking provisions while district courts have passed upon the constitutional objections and enjoined striking governmental employees. In 1966 the Supreme Court cited the prohibition of governmental employees to strike in the case of *Amell v. U. S.,* 384 U. S. 158 (1966). However, the case involved jurisdictional

questions and not the constitutionality of the Federal statutes prohibiting strikes.

The leading case on the anti-striking provisions with respect to Federal employees is the *United Federation of Postal Clerks v. Blount,* 325 F. Supp. 879 (D.C. D.C. 1971). The court found that there is no constitutional right to strike and that:

> "Given the fact that there is no constitutional right to strike, it is not irrational or arbitrary for the Government to condition employment on a promise not to withhold labor collectively and to prohibit strikes by those in public employment, whether because of the prerogatives of the sovereign, some sense of higher obligation associated with public service, to assure the continuing functioning of the government without interruption, to protect public health and safety or for other reasons." 325 F. Supp. at 883.

The court found that neither the common law nor the constitution guarantees the right to strike:

> "At common law no employee, whether public or private, had a constitutional right to strike in concert with his fellow workers." 325 F. Supp. at 882.

Considering constitutional objections:

> "Furthermore, it should be pointed out that the fact that public employees may not strike does not interfere with their rights which are fundamental and constitutionally protected." 326 F. Supp. at 883.

The rationale for prohibition against strikes by government employees was capsulized by the court:

> "Congress has an obligation to ensure that the machinery of the Federal Government continues to

> function at all times without interference. Prohibition of strikes by its employees is a reason for implementation of that obligation." 325 F. Supp. at 884.

Governmental employees not only owe unique obligation to the sovereign in that the operations of government are considered so essential as to be assumed by the government rather than private business, but also are not subject to the same market forces as the private sector. Absent unique powers of governments to prohibit strikes, there is no adequate limitation on wage demands except taxing limitations, while in the private sector wage demands are constrained by competitive forces. While some have argued that a judicial determination should be made with respect to what services are "essential" and a priori should be given the right to strike, this categorization is a fundamental legislative power and should not be disturbed when there is a rational basis for such determination.

Recognizing the legitimate concerns of government to prohibit strikes, the Federal courts have enjoined illegal activities. For example, in *Tennessee Valley Authority v. Local Union No. 110 Of Sheet Metal Workers International Association of Louisville, Kentucky,* 333 F. Supp. 997 (D. C. Ky. 1962), illegal picketing was prohibited. See also *U. S. v. Branch 16 National Association of Letter Carriers, AFL-CIO,* 312 F. Supp. 619 (D. C. Conn. 1970), and *U. S. v. Professional Air Traffic Controllers Organization,* 438 F. 2d 79 (C. A. N. Y.), cert. den. 402 U. S. 915 (1970).

Similarly state courts have recognized the right of public employers to prohibit strikes. For example, the leading case in New York is *City of New York v. DeLury,* 23 N. Y. 2d 175 (1969). The court categorically rejected

the constitutional arguments. Speaking for the court in an unanimous opinion Chief Justice Fuld first found no due process violations:

> "Manifestly, neither the Fourteenth Amendment to the Federal Constitution nor the Bill of Rights of the State Constitution (Art. I) grants to any individual an absolute right to strike. On the contrary, that right is subject to the qualification that, if a strike is for an illegal objective, it is enjoinable at the instance of an aggrieved party." 23 N. Y. 2d at 181.

Second, Justice Fuld set forth the public policy upon which this prohibition is based:

> "Quite obviously, the ability of the Legislature to establish priorities among government services would be destroyed if public employees could, with impunity, engage in strikes which deprive the public of essential services. The striking employees, by paralyzing a city through the exercise of naked power, could obtain gains wholly disproportionate to the services rendered by them and at the expense of the public and other public employees. The consequence would be the destruction of democratic legislative processes because budgeting and the establishment of priorities would no longer result from the free choice of the electorate's representatives but from the coercive effect of paralyzing strikes of public employees." 23 N. Y. 2d at 183.

New York State has also rejected arguments based upon constitutional provisions granting equal protection under the laws. For example in *Rankin v. Shanker,* 23 N. Y. 2d 111 (1969), the court stated:

> "Ever since the enactment of the Norris-LaGuardia Act and our state's Little Norris-LaGuardia Act, the view has been uniformly and consistently

held that a legitimate distinction between public and private employment is constitutionally permissible." 23 N. Y. at 116.

Other states have expressly or by clear implication upheld the constitutionality of anti-striking provisions. For example, *Norwalk Teachers Association v. Board of Education*, 138 Conn. 269 (1951); *Wilmington v. General Teamsters Local Union*, 290 A. 2d 8 (Del. 1972); *American Federation of State, County, and Municipal Employees v. Fort Lauderdale*, 273 So. 2d 441 (Fla. 4th Dist. 1973); *International Longshoremen's Association v. Georgia Ports Authority*, 217 Ga. 712 (1962), cert. den. 370 U. S. 922 (1962); *Detroit v. Amalgamated Association of Street, etc.*, 332 Mich. 257, app. dismd. 344 U. S. 805 (1952); *Head v. Special School District*, 288 Minn. 496, cert. denied 404 U. S. 886 (1971); *Grandview v. Moor*, 481 S. W. 2d 555 (Mo. 1972); *Cleveland v. Division 268 of Amalgamated Assn.*, 41 Ohio Op. 236 (1949), and *South Atlantic and Gulf Coast District v. Harris County—Huston Ship Channel Navigation District*, 358 S. W. 2d 658 (Tex. 1962), cert. denied 372 U. S. 975.

POINT II.

Hearings before a public officer-employer on charges of illegal strike activities by employees do not violate procedural due process.

An employer has the basic right to hire and fire absent contractual, statutory or constitutional prohibitions to the contrary. A public employer has the additional obligation to provide essential services such as education. Interruptions in the education of students by striking teachers is not a mere emotional cry of heated condemnation but also a reality. In the City of New York protracted teachers' strikes have irreparably set back the education of students. School boards have the unique obligation of assuring the public that education of students is not interrupted. In the first instance school boards should also take all necessary and reasonable steps to provide that education. Accordingly most states have prohibited strikes, see Point I, *supra*, and have given school boards or their chief executive officer broad powers to deal with strikes (e. g., 9 Civil Service Law Section 210 [2] [d] New York).

The scope of procedural due process afforded striking government employees depends upon the deference of the Federal government and Federal courts to states which have established substantive and procedural labor relations of its own employees, and a balancing of the interests of government with the interests of governmental employees. Procedural due process is an elusive term. Depending on balancing of interests involved, due process requirements can range from the right to a pre-termination hearing (e. g., *Goldberg v. Kelly*, 397 U. S. 254 [1970]) to an arbitrary and capricious refusal to rehire a non-tenured teacher by an administrator-employer without a hearing or without stating any reasons (*Board of Regents v. Roth*, 408 U. S. 564 [1972]).

Common sense of justice and flexibility permeate the concept of due process. This principle can be extrapolated from the case of *Cafeteria Workers v. McElroy*, 367 U. S. 886, 895 (1961):

> "The very nature of due process negates any concept of inflexible procedures universally applicable in every imaginable situation."

Due process must also be considered in light of the statutory rights created for public employees. Justice Renh-

quist capsulized the conundrum of the public employer in *Arnett v. Kennedy,* 416 U. S. 134 (1974):

> "For almost the first century of our national existence, federal employment was regarded as an item of patronage, which could be granted, withheld, or withdrawn for whatever reason might appeal to the responsible executive hiring officer." 416 U. S. at 148.

Federal legislation subsequently established civil service rights for employees and the states followed this action. Attendant with these rights were removal procedures. Bifurcating the legislative intent was the conundrum of which Justice Renhquist wrote:

> "Only by bifurcating the very sentence of the Act of Congress which conferred upon appellee the right not to be removed save for cause could it be said that he had an expectancy of that substantive right without the procedural limitations which Congress attached to it. In the area of federal regulation of government employees, where in the absence of statutory limitation the governmental employer has had virtually uncontrolled latitude in decisions as to hiring and firing." 416 U. S. at 152.

The role of the Federal courts in reviewing state regulations is more limited than of Federal regulations which is another reason why the Federal courts should defer to state legislatures with respect to establishment of substantive rights and procedural remedies in this area. Deference to state regulation for the public welfare was recognized by the Supreme Court in *Nebia v. New York,* 291 U. S. 502 (1934):

> "The Fifth Amendment, in the field of Federal activity, and the Fourteenth, as respects state action, do not prohibit governmental regulation for the public welfare. They merely condition the exer-

> tion of the admitted power, by securing that the end shall be accomplished by methods consistent with due process. And the guarantee of due process, as has often been held, demands only that the law shall not be unreasonable, arbitrary, or capricious, and that the means selected shall have a real and substantial relation to the object sought to be attained." 291 U. S. at 525.

Anti-striking laws serve a legitimate governmental purpose and cannot be said to be totally unreasonable, arbitrary or capricious in light of the legitimate governmental purpose served by them. In granting public employees civil service protection or tenure the government has a legitimate interest in establishing procedures to protect itself and the public from illegal activities which prevent the government from providing essential services. Recognizing that the Constitution does not protect unbridled activities that cause substantial public injury, the court in *Nebia, supra,* noted:

> "The Constitution does not secure to anyone liberty to conduct his business in such fashion as to inflict injury upon the public at large, or upon any substantial group of people." 291 U. S. 502, 538-39).

The states' rights to broadly regulate terms and conditions of employment, minimum wages and maximum commissions to employment agencies have been recognized by the Supreme Court. As Justice Douglas noted in the case of *Olson v. Nebraska, ex rel. Western Reference and Bond Association,* 313 U. S. 236 (1941):

> "We are not concerned, however, with the wisdom, need, or appropriateness of the legislation. Differences of opinion on that score suggest a choice which 'should be left where • • • it was left by the Constitution—to the States and Congress.'" 313 U. S. at 246.

The states' interests in regulating its own employees is even more compelling. A fortiori the wisdom, need or appropriateness of legislation prohibiting strikes by public employees and setting forth procedures for strike violators should not be disturbed. If the federal government does not prohibit industry from replacing employees on an illegal strike, *Labor Board v. Fansteel Corporation,* 306 U. S. 249, 256 (1939), states and their subdivisions should have even broader powers in light of the 10th Amendment to the Federal Constitution and the conspicuous absence of Federal regulation of state labor relations.

Even assuming that state anti-strike laws are subject to Federal due process, there are compelling reasons for the public employer to make initial determinations which are subject to review in the courts. The mere fact that an employer passes on a decision with respect to activities of its employees does not violate due process. In *Arnett, supra,* where the hearing officer was a slandered supervisor, the Supreme Court in a majority decision held that the slandered supervisor could be the hearing officer in a pre-termination hearing. In that same decision Justice White recognized that a public officer can make determinations concerning public employees directly under his supervision:

> "Fairness and accuracy are not always threatened simply because the hearing examiner is the supervisor of an employee." 416 U. S. 134, 199.

Nor where decisions are reviewable, due process does not require administrative hearings to be judicial or quasi-judicial. For example, in *Goldberg, supra,* Justice Brennan noted:

> "(T)he pre-termination hearing need not take the form of a judicial or quasi-judicial trial." 397 U. S. 254, 266.

Similarly Justice Stuart in delivering the opinion in *Board of Regents v. Roth,* 408 U. S. 564 (1972), refused to disturb a state law on tenure which permitted school administrators to refrain from rehiring nontenured teachers.

Assuming public employees are entitled to an initial determination of whether they are on strike, whether that determination must be made by the courts rather than by the public employer depends upon a balancing of interest in light of the realities. An analogy to the balancing test advanced by Justice Powell in the *Arnett* decision sheds light on the factors which should be considered in school district hearings. Justice Powell succinctly set forth the test to be applied:

> "The resolution of this issue depends on a balancing process in which the government's interest in expeditious removal of an unsatisfactory employee is weighed against the interest of the affected employee in continued public employment." 416 U. S. 134, 167-68.

In a school district the "rights" of the teacher to maintain their tenured positions while engaging in a protracted strike must be balanced with the school district's interest to provide uninterrupted education. Justice Powell in *Arnett, supra,* found the government's interest to be paramount:

> "(T)he Government, as an employer, must have wide discretion and control over the management of its personnel and internal affairs. This includes the prerogatives to remove employees whose conduct hinders efficient operation and *to do so with Dispatch. Prolonged retention of disruptive or otherwise unsatisfactory employee can adversely affect discipline and morale* in the work place, foster

disharmony, and ultimately impair the efficiency of an office or agency. Moreover, a requirement of a prior evidentiary hearing would impose additional administrative costs, create delay, and deter warranted discharges. Thus, the Government's interest in being able to act expeditiously to remove an unsatisfactory employee is substantial." 416 U. S. 134, 168. (Italics added.)

Similarly a school district should have wide discretion and control over striking employees. This discretion should include the prerogative to remove striking employees whose conduct hinders efficient operations of the school district and to do so with dispatch. Procrasted solutions would be disruptive to the school system and create disharmony, morale and discipline problems not only with other teachers but also would engender the same spirit of rebellion among students. A school board hearing is also much more economical. Accordingly the school district's interest in being able to act expeditiously is paramount.

School administrators are not inherently biased against teachers. Often times administrators have worked their way through the academic ranks and themselves were teachers. School districts are more interested in providing education than replacing an entire staff that is out on strike. When a protracted strike has occurred, further interruption in the students' education should not be delayed by a judicial hearing in which the court will inevitably and inextricably become involved with the negotiating process. Courts should play an active role in review of the procedures to insure fundamental due process, but only school boards are capable of minimizing the disruptive interruptions in the educational process attendant with strikes. Members of school boards are public officers and there should be no presumption that they are incapable of making unbiased decisions with respect to the people

they supervise. In the event of a biased, arbitrary or capricious decision adequate judicial review is available.

New York State has specifically considered the question of an in-house hearing officer to consider penalties for striking employees. On remand from the United States Supreme Court in light of the *Arnett* case, *supra,* the New York State Court of Appeals in the case of *Sanford v. Rockefeller,* 35 N. Y. 2d 547 (1975), in rejecting arguments that executive officers are inherently biased and their decisions violate due process stated:

> "It is further argued that * * * a post-penalty hearing will only be held at the unfettered discretion of the reviewing officer. The short answer to that is that the officer's discretion is, rather, open to review. His determination summarily rejecting the excuses contained in the employee's affidavit is subject to Article 78 review as specifically provided for in Paragraph (h) of subdivision 2." 35 N. Y. 2d at 562.

In short, the answer to clamors of impartiality to employer-hearing officer decisions is met by post-hearing judicial review by state courts.

Conclusion.

Substantive due process does not guarantee public employees the right to strike. Labor relations of governmental employees should be left to the broad discretion of the respective governmental employers. In balancing the relative interest of the public employee with the public employer, procedural due process is not violated when a public officer-employer makes a determination with respect to employees who withheld their services. State

court review of these determinations vitiates any arguments of violations of procedural due process.

Respectfully submitted,

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APPENDIX.

18 U.S.C. Section 1918.

18 U.S.C. Section 1918 Provides:

Whoever violates the provision of Section 7311 of Title 5 that an individual may not accept or hold a position in the Government of the United States or the government of the District of Columbia, if he * * *

> (1) participates in a strike, or asserts the right to strike, against the Government of the United States or the government of the District of Columbia; * * *

shall be fined not more than $1,000 or imprisoned not more than one year and a day, or both.

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1 Wisconsin Statute Section 111.70 (4)(1) (1973).

1 Wisconsin Statute Section 111.70 (4) (1) (1973) provides: "*Strikes prohibited.* Nothing contained in this subchapter shall constitute a grant of the right to strike by any county or municipal employee and such strikes are hereby expressly prohibited."

9 Civil Service Law, §210 (New York, McKinney).

Prohibition of strikes

1. No public employee or employee organization shall engage in a strike, and no public employee or employee organization shall cause, instigate, encourage, or condone a strike.

2. Violations and penalties; presumption; prohibition against consent to strike; determination; notice; probation; payroll deductions; objections; and restoration. (a) Violations and penalties. A public employee shall violate this subdivision by engaging in a strike or violating paragraph (c) of this subdivision and shall be liable as provided in this subdivision pursuant to the procedures contained herein. In addition, any public employee who violates subdivision one of this section may be subject to removal or other disciplinary action provided by law for misconduct.

(b) Presumption. For purposes of this subdivision an employee who is absent from work without permission, or who abstains wholly or in part from the full performance of his duties in his normal manner without permission, on the date or dates when a strike occurs, shall be presumed to have engaged in such strike on such date or dates.

(c) Prohibition against consent to strike. No person exercising on behalf of any public employer any authority, supervision or direction over any public employee shall have the power to authorize, approve, condone or consent to a strike, or the engaging in a strike, by one or more public employees, and such person shall not authorize, approve, condone or consent to such strike or engagement.

(d) Determination. In the event that it appears that a violation of this subdivision may have occurred, the

chief executive officer of the government involved shall, on the basis of such investigation and affidavits as he may deem appropriate, determine whether or not such violation has occurred and the date or dates of such violation. If the chief executive officer determines that such violation has occurred, he shall further determine, on the basis of such further investigation and affidavits as he may deem appropriate, the names of employees who committed such violation and the date or dates thereof. Such determination shall not be deemed to be final until the completion of the procedures provided for in this subdivision.

(e) Notice. The chief executive officer shall forthwith notify each employee that he has been found to have committed such violation the date or dates thereof and of his right to object to such determination pursuant to paragraph (h) of this subdivision; he shall also notify the chief fiscal officer of the names of all such employees and of the total number of days, or part thereof, on which it has been determined that such violation occurred. Notice to each employee shall be by personal service or by certified mail to his last address filed by him with his employer.

(f) Probation. Notwithstanding any inconsistent provision of law, any public employee who has been determined to have violated this subdivision shall be on probation for a term of one year following such determination during which period he shall serve without tenure; provided, however, that the effect of probation hereunder with regard to teachers and others subject to the education law shall not exceed or differ from the effect of probation hereunder with regard to other public employees.

(g) Payroll deductions. Not earlier than thirty nor later than ninety days following the date of such determination, the chief fiscal officer of the government in-

volved shall deduct from the compensation of each such public employee an amount equal to twice his daily rate of pay for each day or part thereof that it was determined that he had violated this subdivision; such rate of pay to be computed as of the time of such violation. In computing such deduction, credit shall be allowed for amounts already withheld from such employee's compensation on account of his absence from work or other withholding of services on such day or days. In computing the aforesaid thirty to ninety day period of time following the determination of a violation pursuant to subdivision (d) of paragraph two of this section and where the employee's annual compensation is paid over a period of time which is less than fifty-two weeks, that period of time between the last day of the last payroll period of the employment term in which the violation occurred and the first day of the first payroll period of the next succeeding employment term shall be disregarded and not counted.

(h) Objections and restoration. Any employee determined to have violated this subdivision may object to such determination by filing with the chief executive officer, (within twenty days of the date on which notice was served or mailed to him pursuant to paragraph [e] of this subdivision) his sworn affidavit, supported by available documentary proof, containing a short and plain statement of the facts upon which he relies to show that such determination was incorrect. Such affidavit shall be subject to the penalties of perjury. If the chief executive officer shall determine that the affidavit and supporting proof establishes that the employee did not violate this subdivision, he shall sustain the objection. If the chief executive officer shall determine that the affidavit and supporting proof fails to establish that the employee did not violate this subdivision, he shall dismiss the objection and so notify the employee. If the chief executive

officer shall determine that the affidavit and supporting proof raises a question of fact which, if resolved in favor of the employee, would establish that the employee did not violate this subdivision, he shall appoint a hearing officer to determine whether in fact the employee did violate this subdivision after a hearing at which such employee shall bear the burden of proof. If the hearing officer shall determine that the employee failed to establish that he did not violate this subdivision, the chief executive officer shall so notify the employee. If the chief executive officer sustains an objection or the hearing officer determines on a preponderance of the evidence that such employee did not violate this subdivision, the chief executive officer shall forthwith restore to the employee the tenure suspended pursuant to paragraph (f) of this subdivision, and notify the chief fiscal officer who shall thereupon cease all further deductions and refund any deductions previously made pursuant to this subdivision. The determinations provided in this paragraph shall be reviewable pursuant to article seventy-eight of the civil practice law and rules.

3. (a) An employee organization which is determined by the board to have violated the provisions of subdivision one of this section shall, in accordance with the provisions of this section, lose the rights granted pursuant to the provisions of paragraph (b) of subdivision one of section two hundred eight of this chapter.

(b) In the event that it appears that a violation of subdivision one of this section may have occurred, it shall be the duty of the chief executive officer of the public employer involved (i) forthwith to so notify the board and the chief legal officer of the government involved, and (ii) to provide the board and such chief legal officer with such facilities, assistance and data as will enable the board and such chief legal officer to carry out their duties under this section.

(c) In the event that it appears that a violation of subdivision one of this section may have occurred, the chief legal officer of the government involved, or the board on its own motion, shall forthwith institute proceedings before the board to determine whether such employee organization has violated the provisions of subdivision one of this section.

(d) Proceedings against an employee organization under this section shall be commenced by service upon it of a written notice, together with a copy of the charges. A copy of such notice and charges shall also be served, for their information, upon the appropriate government officials who recognize such employee organization and grant to it the rights accompanying such recognition. The employee organization shall have eight days within which to serve its written answer to such charges. The board's hearing shall be held promptly thereafter and at such hearing, the parties shall be permitted to be represented by counsel and to summon witnesses in their behalf. Compliance with the technical rules of evidence shall not be required.

(e) In determining whether an employee organization has violated subdivision one of this section, the board shall consider (i) whether the employee organization called the strike or tried to prevent it, and (ii) whether the employee organization made or was making good faith efforts to terminate the strike.

(f) If the board determines that an employee organization has violated the provisions of subdivision one of this section, the board shall order forfeiture of the rights granted pursuant to the provisions of paragraph (b) of subdivision one of section two hundred eight of this chapter, for such specified period of time as the board shall determine, or, in the discretion of the board, for an indefinite period of time subject to restoration upon applica-

tion, with notice to all interested parties, supported by proof of good faith compliance with the requirements of subdivision one of this section since the date of such violation, such proof to include, for example, the successful negotiation, without a violation of subdivision one of this section, of a contract covering the employees in the unit affected by such violation; provided, however, that where a fine imposed on an employee organization pursuant to subdivision two of section seven hundred fifty-one of the judiciary law remains wholly or partly unpaid, after the exhaustion of the cash and securities of the employee organization, the board shall direct that, notwithstanding such forfeiture, such membership dues deduction shall be continued to the extent necessary to pay such fine and such public employer shall transmit such moneys to the court. In fixing the duration of the forfeiture, the board shall consider all the relevant facts and circumstances, including but not limited to: (i) the extent of any wilful defiance of subdivision one of this section (ii) the impact of the strike on the public health, safety, and welfare of the community and (iii) the financial resources of the employee organization; and the board may consider (i) the refusal of the employee organization or the appropriate public employer or the representative thereof, to submit to the mediation and fact-finding procedures provided in section two hundred nine and (ii) whether, if so alleged by the employee organization, the appropriate public employer or its representatives engaged in such acts of extreme provocation as to detract from the responsibility of the employee organization for the strike. In determining the financial resources of the employee organization, the board shall consider both the income and the assets of such employee organization. In the event membership dues are collected by the public employer as provided in paragraph (b) of subdivision one of section two hundred eight of this chapter, the books and records of

such public employer shall be prima facie evidence of the amount so collected.

(g) An employee organization whose rights granted pursuant to the provisions of paragraph (b) of subdivision one of section two hundred eight of this article have been ordered forfeited pursuant to this section may be granted such rights after the termination of such forfeiture only after complying with the provisions of clause (b) of subdivision three of section two hundred seven of this article.

(h) No compensation shall be paid by a public employer to a public employee with respect to any day or part thereof when such employee is engaged in a strike against such employer. The chief fiscal officer of the government involved shall withhold such compensation upon receipt of the notice provided by paragraph (e) of subdivision two of section two hundred ten; notwithstanding the failure to have received such notice, no public employee or officer having knowledge that such employee has so engaged in such a strike shall deliver or caused[1] to be delivered to such employee any cash, check or payment which, in whole or in part, represents such compensation.

4. Within sixty days of the termination of a strike, the chief executive officer of the government involved shall prepare and make public a report in writing, which shall contain the following information: (a) the circumstances surrounding the commencement of the strike, (b) the efforts used to terminate the strike, (c) the names of those public employees whom the public officer or body had reason to believe were responsible for causing, instigating or encouraging the strike and (d) related to the varying degrees of individual responsibility, the sanctions imposed or proceedings pending against each such individual public employee.

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[1]So in original.